of the case. The defendant is not responsible for any neglect or omission of duty after his connection with the case had ceased. If the life of the deceased might have been saved if his leg had been amputated on the day that Dr. Walter was called to attend him, the defendant is not responsible in damages for his death. The jury will determine what are the facts from all the evidence in the case.

If the jury find for the plaintiff, they will assess such damages as will compensate the widow and children for the pecuniary loss they have sustained by the death of the deceased. The jury are not required to estimate the value of his life. If they were, dollars and cents would be a poor standard with which to measure the value of the life of a human being. They are only required to give damages for his death. The widow and children of the deceased are not entitled to recover anything by way of solace for their wounded feelings; they are only entitled to recover damages for the pecuniary loss they have sustained in consequence of his death. The damages ought not to be extravagant or unreasonable. If the defendant had been actuated by malice, the jury might give vindictive damages. But the defendant was not actuated by malice. If he caused the death of the deceased it was not intentional, but the result of ignorance and unskilfulness, and therefore the jury should be merciful while they do justice.

The points submitted by defendant's counsel are affirmed.

The jury found a verdict for plaintiff for $3250.

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*Supreme Court of Maine.*

WOODBRIDGE CLIFFORD ET AL. *vs.* THOMASTON MUTUAL INSURANCE COMPANY.

If a policy of insurance on a vessel expires while she is supposed to be on a voyage, and a second policy for a different sum is taken, after the expiration of the first, there is, in this country, no rule of law which requires payment of that policy under which the vessel sailed, or was last heard from, in the absence of proof of the time of loss.

It is a question of fact for the jury to determine *when* a presumption of loss arises. So, also, in case of loss, the *time* it occurred.

On report from Nisi Prius, DAVIS, J., presiding.

This was an action of *assumpsit* upon a policy of insurance in the sum of $2000, on one-fourth of the brig Hesperus, for one year from the 13th day of January 1855, at noon. The plaintiffs are said Clifford, Elbridge Huff, and James Chase; the policy was to "W. Clifford and whom it concerns."

The brig sailed from Boston for the Lobos Islands—a voyage of thirty or forty days—on the 4th day of January 1856, as the plaintiffs contend, or on the 9th day of the same month, as is contended by the defendants, and was never heard of afterwards.

On the 26th day of January 1856, said Clifford obtained from the defendants another policy upon *his* interest in the brig, for $1000 for one year from the 13th day of January 1856, at noon; on which policy an action is pending, a suit having been instituted to save the limitation of the statute accepting the surrender of the defendant company.

Abandonment was duly made.

The question to be determined, is, under which policy the loss occurred. It was contended by the plaintiffs that there is a rule of law, which requires that policy to be paid under which the vessel sailed, or was last heard of, in the absence of proof of the time of loss. The defendants contended the burden was upon the plaintiffs to show that the vessel was lost before noon of the 13th of January.

If the court should be of the opinion, that, upon the facts reported, the defendants are liable in this action, they are to be defaulted; but if there is no such rule of law, as plaintiffs claim, and the defendant's liability is a question of fact for the jury, the action is to stand for trial.

*M. H. Smith*, for the plaintiffs.—"In the case of missing vessels the loss is presumed to have happened immediately after the date of the last news, so that if an insurance be for three months, and the vessel not being heard from, a further insurance is made for a year, and the vessel is never heard from, in that case the first insurer pays the loss:" 3 Kent's Com. 301.

The law in France is the same: Boulay Paty, Droit Com., tom. 4, p. 248, ed. 1823.

The Guidon de la Mer states that the assured "is to furnish valid attestation of the loss or capture, containing the hour and place where it happened, *if it may be*. This expression, *if it may be*, decides the question against the insurer, so that if the assured

cannot prove at what time the vessel has perished, it is to be presumed that the loss happened before the final term of the insurance."

Another question, stated by Emerigon:—"I have caused my vessel to be insured for three months, reckoning from the day of departure. Not having any news of her after this term, I effect second insurances. One year or two years pass away without its being known what has become of her. Shall the loss fall on the first insurers or on the second? I think that it should fall on the first, and that the second insurers are in the case of return of premiums. I rest on the example of the absent, and I add that the second insurances do not cover the preceding ones, which consequently remain in all their force, until the first insurers have shown that the disaster has happened after the time fixed by their policy.

"The question is then the same, whether the insurances on time have been repeated or have not been so, provided the epoch of the loss be absolutely unknown. This repetition of insurance is a fact foreign to the first insurance:" Emerigon, translated by Meridith, p. 617, ed. of 1850.

Emerigon also states, pages 613, 614:—

"The vessel of which no news is heard during a certain time is presumed to be lost; it is a *legal presumption* that the vessel is lost, because *default of news* is viewed as a legitimate attestation of loss."

The question presented has never been decided in this state. When a principle of commercial law is unsettled, the rule adopted by other commercial nations, and especially by so old a nation as France, approved as it is in the United States by authority so high as that of Mr. Chancellor KENT, is worthy of respectful consideration, if indeed it should not be implicitly followed.

The rule as laid down by KENT, and as established in France, is one demanded by public policy, for reasons similar to those that caused the adoption of the rule deducting one-third new for old in the case of repairs. This is a positive rule, originating in the convenience of having a determinate and precise test in all cases, which, by its universality and uniformity, may render unnecessary inquiries into matters and circumstances necessarily uncertain, and which circumstances are rather calculated to perplex than elucidate. See *Smith* vs. *Bell*, 2 Caines Cases in Error 157.

The rule of deducting one-third new for old has been adopted on the ground of public policy, and to prevent a multiplicity of suits, although by its application an exactly correct result can never be arrived at, and in many cases the result may be very far from correct; and although the value of the old and of the new is capable of being proved, while in the case at bar the *time* of the loss is not capable of being proved, nor is the *loss itself* capable of proof except as a legal presumption arising solely from lapse of time, and not from weather, storms, &c.

If the ruling contended for by defendants is adopted, in every instance of a missing vessel insured when last heard of, a trial must be had to establish the fact of the *time* of loss, and the fact that there are two policies does not alter it. If this rule be adopted, if there had been no second policy, the plaintiffs in the case at bar must prove the vessel lost before the expiration of the first policy, or he could not recover, although the vessel had not been heard from for any number of years.

To use the form of expression before quoted from the Guidon de la Mer, the time of loss is to be proved, "*if it may be*," and as is there stated, this "*if it may be* decides the question against the insurer."

If it were possible for the insured to prove the exact time of loss, he would be obliged so to do, he taking the *onus probandi.*

If it were possible for the insurers to prove, or even to produce testimony tending to prove that the vessel was not lost within the time covered by the policy, by any peril for which insurers would be liable, they would be allowed to prove it.

As both these propositions involve an impossibility, it may not be, and the proposed testimony as to time of loss is neither demanded nor to be allowed.

In England and the United States, no certain time is fixed when a missing vessel shall be presumed to be lost. Phillips on Insurance, vol. 2, p. 661, states the rule to be, "A vessel not heard from for some while after *reasonable time* for intelligence, is presumed to have been lost by perils of the sea."

It will be perceived that the presumption of loss depends upon *time alone* since heard from—either one and a half years, as in Spain, one or two years, as in France, or a reasonable time as in England and the United States. How long a time would be a *reasonable time*, within which a vessel must be heard from, would of course depend much upon the length of her intended voyage.

In the case at bar, defendants do not contend but that sufficient time had elapsed before the commencement of this suit, to raise the legal presumption of a loss of the brig. Nor can they contend that the law requires any further or other proof than of the lapse of time since heard from, to establish the loss, and it would seem that the loss being admitted, they should not be allowed to say to plaintiffs in this suit, in addition to proof of loss by the legal presumption—you must also prove that the loss took place before January 13th 1856, to entitle you to recover. If defendants can take this position, what is the propriety, or what the use of proving the lapse of time since the vessel was heard from?

*Gould*, for the defendants.—This case is now presented to ascertain upon what principles the trial of it should proceed. Is there any rule of law which will determine it? Is proof of usage admissible to control it? Is there any presumption of loss in the case of missing vessels, and, if so, when will it arise? Is there anything which takes the case out of the general rule, that the burden is upon the plaintiff to prove that the loss took place within the life of the policy? If not, what proof may be regarded as sufficient to authorize a jury to find a loss?

When a missing vessel shall be presumed to have perished by perils of the sea depends upon circumstances, and there is no precise time fixed by the English law: 3 Kent's Com. 301. See, also, 2 Arnould's Ins. 793–4; *Greene* vs. *Brown*, 2 Strange 1199; *Houstman* vs. *Thornton*, Holt's N. P. 242; *Newley* vs. *Reed*, cited in Marshall's Ins. 490; *Koster* vs. *Reed*, 6 B. & C. 19; *Brown et al.* vs. *Neilson et al.*, 1 Caines 525; *Gordon* vs. *Brown*, 2 Johns. 150; *Paddock* vs. *Franklin Insurance Co.*, 11 Pick. 237; *Cohen* vs. *Hinkley*, 2 Camp. 51; 2 Greenl. Ev., § 386; 3 Starkie's Ev. 1165–6; Park's Ins. (7th Ed.) 106; 2 Phillips's Ins. 465 (Ed. of 1834).

But all the cases furnish no definite aid in this case. No presumption of loss could arise from *lapse of time*, the policy having but four days to run, when the vessel sailed on a voyage of thirty or forty days, and, so far as is known, no such storm occurred during the first of the voyage, as to render it *reasonably certain* that the vessel was lost during the life of the policy.

What will the jury be authorized to do? In *Coles* vs. *Marine Insurance Co.*, 3 Wash. C. C. R. 161, it is said, that "it is not enough for the assured to prove that there was a storm, or any

other peril encountered by the ship during the voyage, but he must also show that the loss was caused thereby." See, also, *Coffin* vs. *Phœnix Insurance Co.*, 15 Pick. 291.

KENT, as cited by plaintiffs, is simply stating a rule of *foreign law* (French), while he expressly states that no such rule obtains in England or in this country.

The question is not, whether the vessel is lost, but was she lost within the life of the policy?

The present lapse of time is, undoubtedly, sufficient to raise the presumption of loss; but did the lapse of *four days* after the vessel sailed, raise the presumption that she was lost within the life of the policy?

The opinion of the court was delivered by

MAY, J.—Insurance, for $2000, was effected by the plaintiffs, in the defendant company, by a policy upon one-fourth of the brig Hesperus, for one year from the 13th day of January 1855, at noon, upon which policy this action is brought. The brig sailed from Boston for the Lobos Islands not more than nine days before the expiration of said policy, the voyage, ordinarily, requiring from thirty to forty days, and has not been heard from since her departure. Subsequently, Woodbridge Clifford, one of the plaintiffs, effected another insurance in the same company, upon one-eighth of said brig, the risk commencing at the termination of the first policy.

It is conceded by the defendants that the brig had been missing for a period of time sufficiently long to raise the presumption of her loss prior to the commencement of this suit; and the only question now raised, is, whether the common law, which prevails in this state, has any fixed rule by which the loss, in case of missing vessels, is to be presumed as having occurred immediately after the date of the last news, so that the loss must fall under the policy then in force, without regard to any evidence offered touching the state of the weather after sailing, the dangers of the voyage in its various parts, the season of the year, and other circumstances tending to show when the loss probably occurred. It is contended for the plaintiff that such is the law.

The authorities cited by the counsel for the plaintiffs, in his very able argument upon the question presented, clearly show that the rule he contends for is the law of France; and the reasons which he presents, as tending to show the propriety and

necessity of the rule, are not without great force. It appears, however, that this rule as stated by Emerigon, and other distinguished foreign writers, had its origin, not in the common law, but in an ancient ordinance of the French government. So, too, the same government, as well as Spain, and perhaps some other European states, has its fixed rule as to what length of time a vessel must be at sea, without being heard from, in order to raise a presumption of loss. The time, however, differs in different countries and in different voyages. The commercial policy of each of the governments referred to, has, however, made the rule as to time, when a presumption of loss shall arise, absolute in each particular case.

No case has been cited, in this country or from England, in which it has been held that the common law has any *fixed time* within which the loss of a missing vessel, unheard from, is to be presumed, and, when presumed from the facts and circumstances of the case, no case is found fixing the precise time of the loss or that it occurred immediately after the latest news. On the contrary, all the cases, so far as any have been cited or examined, show that the question *when* a presumption of loss arises, is a question of fact for the jury, to be determined in view of all the facts and circumstances in the case; and, when a presumption of loss has arisen, the question as to the *precise time* when it occurred, is to be determined in the same way.

In the case of *Brown et al.* vs. *Nielson et al.*, 1 Caines 525, cited in defence, it appears that the missing vessel sailed from Norfolk, Va., for New York, March 4th 1801, the policy expiring the 28th of the same month; and the question, whether the loss happened within the life of the policy, was submitted to the jury under instructions from the presiding judge, that they must determine the *time of the loss* from the evidence in the case, and this instruction was held to be correct.

In Arnould on Insurance, vol. 2 (Perkins's 2d ed.), p. 797, the author, after stating the rule in France to be that, in the case of a missing ship, the loss will be presumed to have happened immediately after the last news, says that, "in our law *no fixed periods* are established after which a ship not heard of shall be deemed to have perished at sea, but each case is left to depend on its own circumstances and the judgment of practical men." As no authority is cited to the contrary from any court of common law, it may well be presumed that Chancellor KENT, in the extract

cited from his Commentaries, vol. 3, p. 301, had reference to the French rule before referred to; but, if it is not so, he is unsustained by any respectable authority. From the authorities which have been cited, and many others that might be, we have no hesitancy in coming to the conclusion, that no such rule exists at common law as that for which the counsel for the plaintiffs contends.

It may not, however, be needless to remark, that the conclusion to which we have arrived, is greatly strengthened by the decided cases, in regard to the precise time of the death of a person, who has been absent from the place of his residence for seven years or more, without being heard from. The cases are uniform that, although the presumption of his death arises at the end of seven years, yet there is no presumption of law as to what precise time it occurred, and the time of his death is to be determined by a jury, upon the circumstances of the case. See 1 Greenl. Ev. § 41, note 3, and cases there cited. In one of which, that of *Doe* vs. *Nepean*, 5 B. & Ad. 86, it appears that the person, the time of whose death came in question, was last known to have sailed in a vessel which was never heard from, and yet the court held that the precise time of his death was for the jury, upon the facts in the case. In this case, in the absence of all other facts, there could have been no reasonable doubt that the death of the person in question, and the loss of the vessel in which he sailed, were simultaneous, and yet no such rule as is now urged was contended for. See, also, *Eagle* vs. *Emmett*, 4 Brad. 117; *Spencer* vs. *Roper*, 13 Iredell 333. This class of cases is so analogous to those involving the question before us, that no reason is perceived why the same rule should not apply to both.

The question as to the admissibility of proof to show an existing usage among insurance offices, in the case of missing vessels, to presume that the loss took place immediately after the last news, though somewhat discussed by the counsel for the plaintiffs, is not before us, and therefore is not considered. The result is, that, according to the agreement of the parties, the case is to stand for trial.

Action to stand for trial.

TENNEY, C. J., RICE, CUTTING, GOODENOW, and DAVIS, JJ., concurred.

The foregoing case seems to involve a question of such unusual interest, that we have regarded it worthy of preservation, in a form generally accessible to the profession, throughout the country. We do not see how the courts can adopt any general rule of presumption upon the question of the time of loss in such cases, until the necessities or convenience of business shall have established one. Questions of reasonable time, in all cases of demand and notice, were originally determined by the jury. It is now settled by custom and usage, and has become a full rule of law. The same may sometimes be true in the question before us.

I. F. R.

## *Court of Appeals of New York.*

### LOWELL HOLBROOK AND OTHERS *vs.* FRANCIS VOSE AND OTHERS.

Where goods are sold by a vendor to a vendee transacting business at the same place with himself, and no transit of the goods is contemplated between the parties, and, by the contract of sale, the goods are to be delivered at fixed dates on the receipt of the vendee's notes, on the delivery of the notes, the right of stoppage in transitu does not exist.

It is immaterial that the goods are immediately put by the vendee upon their transit to a distant place, or that the fact that they were to be so transmitted was known to the vendor, provided that the transit was not named to the vendor at the time of the contract.

Where goods are in bond for duties, they may be sold subject to the lien of the United States. If the vendor consents to a withdrawal for transhipment, and the vendee executes the customary bond for that purpose, the right of stoppage in transitu can no longer be exercised by the vendor.

Even assuming that the right of stoppage in transitu continued as between the vendor and the vendee, it is lost if the vendee assigns to an honest purchaser a bill of lading of the goods given to himself on his own transhipment. If a loan is made to the vendee on the faith of an assignment of the bill of lading, which is executed several days after the loan, the delay being incidental to the transhipment, the loan is in contemplation of law made upon the bill of lading, and the lender can claim the rights of a purchaser in good faith.

A., a foreign railroad corporation, having an office in New York, and an executive committee with full power to transact its business, made a contract through its committee with B., for the purchase of a large quantity of railroad iron. The iron was to be delivered at a fixed time on the reception of the company's notes with certain collateral securities. The notes and securities having been given accordingly, a part of the iron on shipboard in port was withdrawn from bond by B.'s consent, and a bond given by A. to the United States to secure the payment of duties, as a condition of transhipment to Milwaukie. While the transhipment was proceeding, A. borrowed money from C. on the faith of the bill of lading. This was not executed until several days after the loan, owing to the fact that the shipment was to be made on a number of vessels, and the bill of lading was not to be executed until all the vessels were laden. The bill